



**GENERAL SERVICES ADMINISTRATION**

**48 CFR Part 6106**

[CBCA Case 2019-61-01; Docket No. GSA-GSACBCA-2019-0005;

Sequence No. 1]

RIN 3090-AK07

**Civilian Board of Contract Appeals; Rules of Procedure of the  
Civilian Board of Contract Appeals**

**AGENCY:** Civilian Board of Contract Appeals; General Services Administration (GSA).

**ACTION:** Proposed Rule.

**SUMMARY:** The Civilian Board of Contract Appeals (Board) proposes to issue rules of procedure for arbitration of disputes between applicants for public assistance grants and the Federal Emergency Management Agency (FEMA) regarding disasters after January 1, 2016.

**DATES:** Interested parties should submit written comments to the Regulatory Secretariat Division at one of the addresses shown below on or before **[Insert 60 days after date of publication in the FEDERAL REGISTER]** to be considered in the formation of the final rule.

**ADDRESSES:** Submit comments in response to CBCA Case 2019-61-01, by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by searching for "CBCA Case 2019-61-01." Select the link "Comment Now"

that corresponds with "CBCA Case 2019-61-01." Follow the instructions provided on the screen. Please include your name, company name (if any), and "CBCA Case 2019-61-01" on your attached document.

- Mail: Civilian Board of Contract Appeals, Office of the Chief Counsel (GA), 1800 M Street N.W., Sixth Floor, Washington, DC 20036.

Instructions: Please submit comments only and cite CBCA Case 2019-01, in all correspondence related to this notice. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check <http://www.regulations.gov>, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

**FOR FURTHER INFORMATION CONTACT:** Mr. James A. Johnson, Co-Chief Counsel, Civilian Board of Contract Appeals, 1800 M Street NW, Suite 600, Washington, DC 20036; at 202-606-8788; or email at [jamesa.johnson@cbca.gov](mailto:jamesa.johnson@cbca.gov), for clarification of content. For information pertaining to the status or publication schedules, contact the Regulatory Secretariat Division at 202-501-4755. Please cite CBCA Case 2019-61-01.

## **SUPPLEMENTAL INFORMATION:**

### **A. Background**

The Board was established within GSA by section 847 of the National Defense Authorization Act for Fiscal Year 2006, Pub. L. 109-163. Board members are administrative judges appointed by the Administrator of General Services under 41 U.S.C. 7105(b)(2).

The Federal Aviation Administration Reauthorization Act of 2018, Pub. L. 115-254, amended the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. 5189a(d), to authorize the Board to conduct binding arbitration of certain disputes between FEMA and applicants for public assistance disaster grants. The 2018 amendment gives an applicant for public assistance the right to have the Board arbitrate eligibility for assistance (or a duty to repay past assistance) for a disaster that occurred after January 1, 2016, if the applicant has filed an appeal of the issue within FEMA, and either the applicant has waited 180 days for a decision or the applicant elects arbitration over a second appeal before any decision becomes final, and if the disputed amount is at least \$100,000 for applicants in rural areas or exceeds \$500,000 for other applicants.

FEMA administers Stafford Act public assistance grants

under regulations at 44 CFR part 206. The Board's arbitration under the amended Act of disputes relating to disasters after January 1, 2016 resembles but is not identical to arbitration the Board has conducted since 2009 of disputes about public assistance related to Hurricanes Katrina and Rita, which happened in 2005, and Hurricane Gustav, which happened in 2008. In the American Recovery and Reinvestment Act of 2009, Pub. L. 111-5, and in later legislation (Pub. L. 113-6), Congress directed "the President [to] establish an arbitration panel" for certain Katrina, Rita, and Gustav assistance disputes. FEMA, for the President, issued a regulation creating that arbitration process (77 FR 44761) and designated the Board the arbitration authority under memoranda of agreement.

By contrast, the 2018 Stafford Act amendment expressly makes the Board the arbitrator of the post-January 1, 2016 eligibility and repayment disputes specified in the Act. This statutory language resembles other legislative grants of authority and jurisdiction to the Board, such as the Contract Disputes Act, 41 U.S.C. 7101-7109. Accordingly, the Board's rules of procedure proposed here will govern arbitrations under the amended Stafford Act, while FEMA's arbitration regulation (44 CFR 206.209) still governs the Board's Katrina, Rita, and Gustav arbitrations.

Under the Stafford Act, as amended, the Board acts for the United States Government to resolve public assistance eligibility and repayment disputes by arbitration. The American Arbitration Association defines arbitration as "the voluntary submission of a dispute to an impartial person or persons for final and binding determination." Arbitration is a speedy and flexible method of dispute resolution. Under the Act, an applicant for FEMA public assistance may seek arbitration only before obtaining final agency action by FEMA as defined by 44 CFR 206.206. An arbitration decision under the proposed rules is the final action by the Executive Branch in a dispute.

FEMA has argued in prior arbitrations at the Board that the arbitrators sit in review of FEMA's public assistance grant determinations and should apply judicial doctrines of deference. The arbitrators have generally rejected that approach, reasoning that because an arbitration decision replaces final action by FEMA, the arbitrators must find facts and interpret the law independently on behalf of the Executive Branch. *E.g., Bay St. Louis-Waveland School District*, CBCA 1739-FEMA (Dec. 8, 2009). The Stafford Act amendment reinforces this conclusion by establishing a "right of arbitration" preceding final agency action and by stating simply that

"the decision of the Board shall be binding" without suggesting that the Board should review, sustain, or reverse FEMA's first appeal decision.

The proposed rules retain the expedited timeline that FEMA's arbitration regulation prescribes for Katrina, Rita, and Gustav arbitrations. Like the FEMA regulation, the proposed rules provide for a hearing within 60 days of an initial conference (Rule 611) and a decision within 60 days after a hearing (Rule 613). The Board Chair may authorize exceptions in particular cases. The proposed rules eliminate or leave to the arbitrators' discretion practices that in the Board's experience have delayed or increased the costs of Katrina, Rita, and Gustav arbitrations. Under proposed Rule 608, an applicant or grantee need not add to the evidence it provided to FEMA for the first appeal. If an applicant or grantee does not submit additional evidence, the arbitrators may not need FEMA to supplement its first appeal decision. The 30-day period under the FEMA regulation for FEMA's response to an arbitration request is omitted. The panel will instead schedule any filings necessary after the arbitration request in a prompt initial conference (Rule 607). Proposed Rule 610 virtually eliminates motion practice. Board arbitrators have generally not found it efficient to resolve contested

jurisdictional or merits motions during proceedings. A panel will instead issue one final decision on all pertinent issues (other than the timeliness of the arbitration request, which should be addressed in the initial conference) based on evidence presented up to the end of a hearing (Rule 611). The proposed rules also prescribe email filing and service (Rules 604, 605, 609) and clarify that a party representative need not be an attorney or be proficient at formally examining or cross-examining witnesses (Rules 605, 611).

Proposed Rule 606 continues the Board's practice of assigning three-judge arbitration panels. Under proposed Rules 607 and 611, one panel member may conduct conferences and may preside alone at a hearing outside Washington, D.C., should the parties desire one. The proposed rules otherwise echo other extant arbitration rules by encouraging the arbitrators and the parties to focus on assembling, by the least costly and most efficient means possible, a record that will allow the arbitrators to issue a just and reasoned decision at the speedy pace that parties expect in arbitration.

## **B. Regulatory Flexibility Act**

GSA certifies that this proposed rule will not have a significant economic impact on a substantial number of

small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 602 et seq., and the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. 104-121, because the proposed rule does not impose any additional costs on small or large businesses.

**C. Paperwork Reduction Act**

The Paperwork Reduction Act, 44 U.S.C. 3501 et seq., does not apply because the proposed rule does not impose any information collection requirements that require the approval of the Office of Management and Budget.

**D. Congressional Review Act**

The proposed rule is exempt from Congressional review under Pub. L. 104-121 because it relates solely to agency organization, procedure, and practice and does not substantially affect the rights or obligations of non-agency parties.

**E. Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs



and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993, or E.O. 13563, Improving Regulation and Regulatory Review, dated January 18, 2011. This proposed rule is not a major rule under 5 U.S.C. 804.

**F. Executive Order 13771**

Executive Order 13771, dated February 3, 2017, sets deregulatory goals for agencies and requires the rescission of two regulations for each new regulation issued. This proposed rule is not a new regulation, but an update to the Board's existing rules of procedure, so Executive Order 13771 does not apply.

**List of Subjects in 48 CFR Part 6106**

Administrative practice and procedure; Disaster relief.

Dated: February 27, 2019

Jeri Somers,  
Chair, Civilian Board of Contract Appeals,  
General Services Administration.

Therefore, GSA proposes to issue 48 CFR part 6106 to read as follows:

**PART 6106—RULES OF PROCEDURE FOR ARBITRATION OF PUBLIC ASSISTANCE ELIGIBILITY OR REPAYMENT**

Sec.

- 6106.601 Scope [Rule 601].
- 6106.602 Authority [Rule 602].
- 6106.603 Purpose [Rule 603].
- 6106.604 Arbitration request [Rule 604].
- 6106.605 Parties; representation; email service [Rule 605].
- 6106.606 Arbitrators; panels [Rule 606].
- 6106.607 Initial conference [Rule 607].
- 6106.608 Evidence; timing [Rule 608].
- 6106.609 Other materials considered [Rule 609].
- 6106.610 Motions [Rule 610].
- 6106.611 Hearing; live or paper [Rule 611].
- 6106.612 Streamlined procedures [Rule 612].
- 6106.613 Decision; finality [Rule 613].

**Authority:** 42 U.S.C. 5189a(d).

**6106.601 Scope [Rule 601].**

The rules in this part establish procedures for arbitration by the Board at the request of an applicant for public assistance from the Federal Emergency Management Agency (FEMA) for a disaster that occurred after January 1, 2016.

**6106.602 Authority [Rule 602].**

The Board is authorized by section 423 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. 5189a(d), to arbitrate disputes between applicants and FEMA as to eligibility for public

assistance (or repayment of past public assistance) for a disaster post-dating January 1, 2016, when the disputed amount exceeds \$500,000 or, for an applicant in a rural area, is at least \$100,000.

**6106.603 Purpose [Rule 603].**

Under the Stafford Act, the Board acts for the United States Government to resolve public assistance eligibility and repayment disputes by arbitration, a speedy and flexible method of impartial dispute resolution. Eligibility and repayment disputes come to the Board prior to final agency action by FEMA. An arbitration decision under these rules is the final action by the Executive Branch in a dispute. These rules facilitate the creation of an arbitration record sufficient to allow the Board to issue a prompt, just, and reasoned decision.

**6106.604 Arbitration request [Rule 604].**

An applicant for public assistance may request arbitration by following 44 CFR 206.209(e) and applicable FEMA guidance implementing section 423 of the Stafford Act. The Board is "the arbitration administrator" for purposes of 44 CFR 206.209(e) and applicable FEMA guidance.

Applicants shall efile arbitration requests with the Board as prescribed by Board Rule 1 (48 CFR 6101.1). Voluminous attachments may be filed separately in

electronic media as if under Board Rule 4(b)(1) and (3) (48 CFR 6101.4(b)(1), (3)). The Clerk of the Board will acknowledge an arbitration request by emailing the parties a docketing notice.

**6106.605 Parties; representation; email service [Rule 605].**

The parties to an arbitration are the applicant, the grantee (if not the applicant), and FEMA. Each party shall have one primary representative. This person need not be an attorney but must be authorized by law, formal delegation, or by permission of the arbitrators to speak and act for the party in the arbitration. Unless otherwise advised, the Board deems the person who signed the arbitration request to be the applicant's primary representative. Any other primary representative or other party representative shall promptly efile a notice of appearance complying with Board Rule 5(b) (48 CFR 6101.5(b)). Unless otherwise directed by the panel, a party shall email its efilings to every other party's primary representative at the time of filing.

**6106.606 Arbitrators; panels [Rule 606].**

The Board assigns three judges as the panel of arbitrators for each request. A single arbitrator may act on behalf of a panel under Rules 607 and 611.

**6106.607 Initial conference [Rule 607].**

The panel will hold a telephonic scheduling conference with all parties as soon as practicable, ordinarily within 14 calendar days after the Clerk docketed an arbitration request. Each primary party representative shall participate in the conference. At least one panel member will preside. The panel will promptly issue to the parties a written summary of the conference and the schedule. A party has 5 calendar days from receipt of the panel's conference summary to efile any objection to it. The panel may hold and summarize other conferences as necessary.

**6106.608 Evidence; timing [Rule 608].**

No party is required to provide additional evidence. An applicant or grantee may, but need not, supplement materials it previously provided to FEMA regarding the dispute. The panel ordinarily deems FEMA's last written decision preceding the arbitration request to state FEMA's position. A party may elect to present additional evidence, i.e., documents, things, or testimony tending to make a factual contention appear more or less likely to be true. If a party so elects, the panel will to the extent practicable allow a response. A panel may not exclude as untimely evidence proffered before close of arbitration under Rule 613. A panel may consider the timing or surprise

nature of evidence when assessing the significance, credibility, or probative value of the evidence.

**6106.609 Other materials considered [Rule 609].**

Written or oral arguments or statements of experts as to how a panel should understand evidence or apply the law are not evidence but may be presented as scheduled by the panel and may be subject to page, word, or time limits. By the close of arbitration under Rule 613, parties should provide the panel with everything it needs to make a decision. Documents written by a party for the panel during arbitration shall comply with Board Rules 1(b) ("Efiles; efilings"), 7, and 23 (48 CFR 6101.1(b), -.7, -.23).

**6106.610 Motions [Rule 610].**

Motions are strictly limited and should ordinarily be made orally during the initial conference under Rule 607. A later motion may be efiled. A party may make a procedural motion, such as to extend time. An applicant may move for voluntary dismissal. No party may move for a prehearing merits decision (e.g., summary judgment or dismissal for failure to state a claim), or for prehearing dismissal other than on the merits except on the grounds that an arbitration request is untimely. A panel ordinarily issues one decision per arbitration.

**6106.611 Hearing; live or paper [Rule 611].**

Parties may conclude arbitration by presenting their positions in a hearing. A hearing may be live or, if agreed by all parties, on a written record (a "paper hearing") or a combination of the two. The panel will begin a hearing within 60 calendar days after the initial conference under Rule 607 unless the Board Chair approves a later date. All panel members will attend a live hearing in Washington, D.C. A single panel member may conduct a live hearing elsewhere. Hearing procedures are at the panel's discretion, with the goal of promptly, justly, and finally resolving the dispute, and need not involve traditional witness examination or cross-examination. Parties should not offer fact witnesses to read legal materials or make legal arguments. Statements of fact in a hearing need not be sworn but are subject to penalty for violation of 18 U.S.C. 1001. Live hearings are not public and may not be recorded by any means without the Board's permission. The Board may have a live hearing transcribed for the panel's use. If a transcript is made, a party may purchase a copy and has 7 calendar days after a copy is available to efile proposed corrections.

**6106.612 Streamlined procedures [Rule 612].**

The Stafford Act provides a right of arbitration to save time and money that might otherwise be spent in the

FEMA appeal process and in court. To that end, the Board encourages parties to focus on providing only the information a panel needs to resolve an eligibility or repayment dispute. Examples may include without limitation—

- (a) Electing not to supplement the materials already provided to FEMA, if (or to the extent) the existing record adequately frames the dispute;

- (b) Relying when possible on documents over other types of evidence;

- (c) Simplifying live hearings by efilings in advance written testimony, reports, or opening statements by some witnesses or party representatives;

- (d) Refraining from objecting to evidence without good cause; and

- (e) Omitting duplicative and immaterial evidence and arguments.

**6106.613 Decision; finality [Rule 613].**

The panel will advise the parties when the arbitration is closed. The panel will resolve a dispute within 60 calendar days thereafter unless the panel advises the parties that the Board Chair approves a later date. The panel's decision may be issued in writing or orally with transcription. A decision is primarily for the parties, is not precedential, and should concisely resolve the dispute.



The decision of a panel majority is the final administrative action on the arbitrated dispute and is judicially reviewable only to the limited extent provided by the Federal Arbitration Act (9 U.S.C. 10). Within 30 calendar days after issuing a decision, a panel may correct clerical, typographical, technical, or arithmetic errors. A panel may not reconsider the merits of its decision resolving an eligibility or repayment dispute.

**Billing Code 6820-AL**

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